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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-532

CONSOLIDATION COAL COMPANY, Petitioner
v.
UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND APPENDIX

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. .....

CONSOLIDATION COAL COMPANY, Petitioner
v.
UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To The Honorable, The Chief Justice and The Associate Justices of the Supreme Court of the United States:

Petitioner, Consolidation Coal Company, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on July 25, 1978, reinstating its prior judgment, which reversed orders of the United States District Court for the Southern District of Ohio suppressing evidence in this criminal prosecution and remanded the case.

OPINIONS AND ORDERS

The original opinion and judgment of the United States Court of Appeals for the Sixth Circuit (hereinafter "Sixth Circuit") appears at 560 F.2d 214 (6th Cir. 1977). The Order of this Court granting Certiorari, vacating the judgment of the Sixth Circuit and remanding the case for further consideration appears at 436 U.S. ....., 98 S. Ct. 2841 (1978). The Order of the Sixth Circuit on remand, not yet reported, is reprinted in the Appendix attached to this petition (A. 1a-3a).[1] The unreported memoranda and orders of the District Court are reprinted in the Appendix to the Petition for Certiorari heretofore filed in this Court by petitioner at No. 77-557. (A. [77-557] 21a-41a, 42a-44a).

JURISDICTION

The Order of the Sixth Circuit reinstating its prior judgment was entered on July 25, 1978. A timely petition for a rehearing *en banc* was denied on August 29, 1978 (A. 4a), and this petition for certiorari was filed within 30 days of that date. On September 14, 1978, the Sixth Circuit granted petitioner's motion to stay issuance of its mandate pending the filing of this petition (A. 5a).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Petitioner is informed that at least Francis Leo Marks, appellant at No. 76-2521 in the Sixth Circuit, is also filing a petition for a writ of certiorari.

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1. References to the Appendix to this petition will be cited as (A. .....). References to the Appendix to the petition filed at No. 77-557 in this Court will be cited as (A. [77-577] .....).

QUESTIONS PRESENTED

1. Whether the less stringent administrative search probable cause standard recently articulated by this Court in *Marshall v. Barlow's, Inc.*, 436 U.S. ....., 98 S. Ct. 1816 (1978) and *Michigan v. Tyler*, 436 U.S. ....., 98 S. Ct. 1942 (1978) is applicable in this case where it is undisputed that the purpose of the searches and seizures in question was the discovery of evidence of suspected criminal violations.

2. Whether administrative search warrants may be employed to force entry into a coal mine operator's private mine offices and seize documents and other property found there despite the specific provisions in the Federal Coal Mine Health and Safety Act of 1969 envisioning resort to federal court enforcement proceedings when entry or the production of documents and records is refused.

3. Whether the affidavits used to obtain the search warrants at issue supply the requisite probable cause.

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. CONST. AMEND. IV—SEARCHES AND SEIZURES

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The provisions of the Federal Coal Mine Health and Safety Act of 1969 (hereinafter "Mine Safety Act") relevant to the issues raised in this case are lengthy and have therefore been set forth in the Appendix attached to this petition (A. 6a-15a). The sections involved are:

> *Section* 103 (30 U.S.C. § 813), entitled "Inspections and Investigations";
>
> *Section* 108 (30 U.S.C. § 818), entitled "Injunctions"; and
>
> *Section* 109 (30 U.S.C. § 819), entitled "Penalties".

STATEMENT OF THE CASE

This case was previously before this Court on a petition for a writ of certiorari at No. 77-557. The petition was granted on June 5, 1978, the prior judgment of the Sixth Circuit vacated and the case remanded "for further consideration in light of *Marshall v. Barlow's, Inc.*, 436 U.S. ..... (1978), and *Michigan v. Tyler*, 436 U.S. ..... (1978)." 436 U.S. ....., 98 S. Ct. 2841 (1978).

On July 25, 1978, the Sixth Circuit, on remand, entered an Order reinstating its prior judgment for the reasons set forth in its original opinion (560 F.2d 214) and remanding the case to the District Court.

This matter began on May 21, 1974, when, at the request of attorneys from the Government Regulations and Labor Section, Criminal Division, United States Department of Justice, a federal magistrate issued search warrants to enter various offices in petitioner's Central Division in Eastern Ohio to search for evidence of suspected criminal violations.

All of the warrants[2] but one were based upon the affidavit of William E. Holgate (A. [77-557] 53a-56a), an employee of the Mining Enforcement and Safety Administration of the Department of the Interior. The remaining warrant was supported by both Holgate's affidavit and that of Thomas A. Jeskey (A. [77-557] 58a-60a), a federal coal mine inspector. These affidavits referred to information obtained from an unnamed former employee of petitioner concerning alleged irregularities in petitioner's respirable dust sampling program and recited that evidence of violations of criminal provisions of the Mine Safety Act was believed to be concealed in the mine offices to be searched. (*See, e.g.*, A. [77-557] 52a-55a).

Searches were conducted pursuant to the warrants in a surprise raid on May 22, 1974 by federal inspectors who had been appointed special deputy United States Marshals. There was no prior demand upon petitioner for the desired materials, nor were any federal court enforcement proceedings initiated to obtain them.

On the authority of the warrants, the deputies entered petitioner's private offices and confiscated a great mass of books, note pads, folders and cassettes, as well as metal file card containers, entire file cabinets or drawers, and a set of scales, (*See, e.g.*, A. [77-557] 51a, 87a, 93a).

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2. The six search warrants involved in this case, with attached returns and affidavits, have been reprinted (A. [77-557] 45a-95a). To avoid duplication, the typewritten portions of the Holgate affidavit filed in support of each warrant were reproduced only with respect to the first warrant.

In August of 1975, indictments were returned against petitioner (and eight of its current or former employees) charging numerous separate violations of two criminal provisions of the Mine Safety Act[3] and two counts of criminal conspiracy.[4] The indictments were based, entirely or primarily, upon the materials seized in the May, 1974 raid and the fruits of the seized materials.

Petitioner filed a timely motion for return of seized property and suppression of evidence in the District Court. On June 11, 1976, the District Court granted petitioner's motion on the ground that the affidavits used to obtain the warrants failed to show probable cause under the two-prong test established by this Court in *Aguilar v. Texas,* 378 U.S. 108 (1964) and *Spinelli v. United States,* 393 U.S. 410 (1969). (A. [77-557] 21a-41a). Respondent's subsequent motion for reconsideration was denied by the District Court on September 2, 1976. (A. [77-557] 42a-44a).

Respondent appealed to the Sixth Circuit under the provisions of 18 U.S.C. § 3731, certifying that the suppressed evidence was "a substantial proof of the charge[s] pending against the defendant[s]." On July 21, 1977, that Court reversed and remanded, a plurality of the panel holding, *sua sponte,*[5] that the administrative standard of probable cause announced in *Camara*

3. Section 109(b) and (d), 30 U.S.C. § 819(b) and (d). (A. 14a-15a).

4. 18 U.S.C. § 371.

5. The applicability in this case of an administrative standard of probable cause was neither briefed nor argued by any party in the District Court or the Sixth Circuit.

v. Municipal Court, 387 U.S. 523 (1967) and *See v. City of Seattle,* 387 U.S. 541 (1967) was controlling in this case, despite the admitted criminal nature of the searches, and that the affidavits satisfied this less stringent test. Circuit Judge Engel, concurring in the result, concluded that the affidavits had met the more onerous standards of *Aguilar* and *Spinelli* but found "certain issues relating to administrative searches and seizures covered [in the plurality opinion] . . . sufficiently troublesome . . . that . . . their resolution [should be saved] until the case arises which demands it." 560 F.2d at 222.

Following this Court's vacation of the judgment and remand of the case for reconsideration in light of *Marshall* and *Tyler,* a plurality of the original panel of the Sixth Circuit, without requesting briefs or hearing oral argument, issued a summary opinion and Order reinstating its previously vacated judgment on the basis that there was "no reason to alter . . . [the] original holding." (A. 2a). Again, Circuit Judge Engel concurred in the result "for the more limited reasons expressed in his original concurrence." (A. 3a).

REASONS FOR GRANTING THE WRIT

1. The Decision of the Sixth Circuit Is in Direct Conflict With the Decision of This Court in Michigan v Tyler.

The Sixth Circuit either failed to reconsider this case in light of *Michigan v. Tyler,* as directed by this Court, or it completely misconstrued that decision.

In *Tyler,* this Court clearly and expressly acknowledged the significant difference between administrative inspections and criminal searches and held that where " 'the authorities are seeking evidence to be used in a criminal prosecution, the usual standard [of probable cause] will apply.' " 436 U.S. at ....., 98 S. Ct. at 1950. This Court's holding in *Tyler* was stated with unmistakable clarity:

> In summation, we hold that an entry to fight a fire requires no warrant, and that once in the building, officials may remain there for a reasonable time to investigate the cause of the blaze. Thereafter, additional entries to investigate the cause of the fire must be made pursuant to the warrant procedures governing administrative searches. [Citations omitted.] Evidence of arson discovered in the course of such investigations is admissible at trial, *but if the investigating officials find probable cause to believe that arson has occurred and require further access to gather evidence for a possible prosecution, they may obtain a warrant only upon a traditional showing of probable cause applicable to searches for evidence of crime. Id.* at ....., 98 S. Ct. at 1951 (emphasis added).

As the following short discussion will show, the Sixth Circuit, on remand, completely ignored the law as given in *Tyler.*

In its original [1977] decision, the Sixth Circuit repeatedly acknowledged the obvious fact that the searches and seizures involved here were "predicated upon overt criminal suspicion rather than administrative necessity." *United States v. Consolidation Coal Company,* 560 F.2d 214, 218 (6th Cir. 1977). The "criminal orientation [of the investigation] was", according to the Court, "*dramatized* by the fact that the mine safety inspectors who executed the warrants were deputized as Special Deputy United States Marshals."[6] *Id.* at 216 n. 6 (emphasis added).

Despite its knowledge that the searches and seizures involved here were to obtain evidence for a criminal prosecution, the Sixth Circuit found that the searches were " 'routine' in scope if not in motivation" and that "[t]heir regulatory character was not diminished" by the manifest criminal suspicion which prompted them. *Id.* at 218. In the context of the Mine Safety Act it held, relying upon *Camara* and *See,* that "[t]he basic rationale for demanding a more compelling showing of probable cause where the purpose of the intrusion is to uncover the fruits or instrumentalities of crime is inapposite. . . ." *Id* at 220. The Court then concluded:

> The magistrate's task will be expedited and the opportunity for reversible error substantially re-

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6. Moreover, the warrants and affidavits themselves state that the searches and seizures were to obtain evidence of suspected criminal violations of the Mine Safety Act. (*See, e.g.,* A. [77-557] 45a-46a, 52a-53a, 55a).

> duced if all Section 813 search warrant applications are subject to a uniform, administrative standard of review, *whether or not criminal violations of the Act are suspected. Id.* at 221 (emphasis added).

In its summary opinion on remand from this Court the Sixth Circuit concluded that its earlier holding "that administrative search warrants were required under the facts of this case" was consistent with this Court's decision in *Marshall* requiring administrative warrants under the Occupational Safety and Health Act (A. 2a). However, the Court overlooked the fact that *Marshall* involved only a routine administrative inspection where there was no indication, as here, that the purpose of the inspector's visit was to uncover evidence of a suspected crime. Above all, it inexplicably ignored the crucial distinction drawn in *Tyler* between the applicable probable cause standard where the authorities are searching for evidence of crime and that appropriate for administrative entries.

The Sixth Circuit's continued reliance upon *Camara* and *See* as authority for the application of an administrative probable cause showing, *even where criminal violations are suspected and the obvious purpose of the search is to obtain evidence for a criminal prosecution,* is clearly erroneous and in direct conflict with this Court's decision in *Tyler*. As Mr. Justice White recently explained in *Zurcher v. Stanford Daily,* 436 U.S. ....., 98 S. Ct. 1970 (1978), "both cases held that a less stringent standard of probable cause is acceptable where the entry is *not* to secure evidence of crime against the

possessor."[7] *Id.* at ....., 98 S. Ct. at 1976 (emphasis added).

Although the Solicitor General made no *express* confession of error as to this point when the case was previously before this Court on certiorari petition, the error was tacitly conceded by the absence of any attempt to justify the Sixth Circuit's action. In fact, the Government candidly acknowledged the criminal nature of the searches involved, as well as the distinction between administrative inspections and criminal searches (which has now twice been missed or ignored by the Sixth Circuit) when it stated

> the inspection [here] was aimed at uncovering evidence of criminal conduct in the Company's administration of the required federal regulatory scheme to monitor the causes of "black lung" disease and at seizing documents and other materials demonstrating corporate non-compliance with the Act, rather than merely searching for physical safety or health hazards.
>
> (Brief for the United States in Opposition at 10 n. 8, at No. 77-557).

In *Tyler* this Court, unlike the Sixth Circuit, recognized that "[t]he showing of probable cause necessary to secure a warrant may vary with the object and in-

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7. Mr. Justice White reiterated this point in his concurring and dissenting opinion in *Tyler*:

> *Camara v. Municipal Court,* . . . and *See. v. City of Seattle,* . . . did not differ with *Frank v. Maryland,* . . . that searches for criminal evidence are of special significance under the Fourth Amendment. 436 U.S. at ....., 98 S. Ct. at 1954.

trusiveness of the search, . . ." 436 U.S. at ....., 98 S. Ct. at 1948.[8] If certiorari is granted, petitioner will argue that where the object of the search is to secure criminal evidence, the intrusion is equally oppressive whether the suspected crime is common law in origin or created by statute. It follows that a warrant justifying a search of this nature may be obtained only upon the traditional showing of probable cause applicable to criminal cases. Such is petitioner's understanding of this Court's holding in *Tyler* and demonstrates the fundamental conflict resulting from the Sixth Circuit's contrary decision.

2. The Sixth Circuit Has Improperly Construed the Mine Safety Act as Sanctioning the Use of Administrative Warrants to Conduct Searches and Seizures in Petitioner's Private Offices and, in so Doing, Is in Conflict With the Ninth Circuit.

This case also presents a conflict between the Sixth and the Ninth Circuits as to whether this Court in *Camara* and *See* was fashioning a rule permitting the generalized use of *ex parte* administrative warrants for searches and seizures by administrative agencies.

In its original [1977] decision in this case the Sixth Circuit held that the Mine Safety Act does not provide for a right of warrantless entry[9] into the mine

8. *See also* LaFave, *Administrative Searches and the Fourth Amendment; The Camara and See Cases,* 1967 SUP. CT. REV. 1, 18-20.

9. If certiorari is granted, petitioner will argue that under the Mine Safety Act there is no right of entry into the operator's private mine offices where he

operator's private offices "and nothing in the Act authorizes the wholesale seizure of records which took place here." 560 F.2d at 217. It reasoned that inspectors must have warrants to justify a search and seizure therein. However, it further concluded, under the authority of *Camara* and *See,* that the Mine Safety Act permitted such warrants to be secured on the less stringent administrative showing of probable cause.

In that holding, recently reaffirmed, the Sixth Circuit wholly ignored the provisions in the Mine Safety Act for the obtainment of subpoenas[10] and/or injunctions[11] and the issuance of civil fines[12] to compel entry and obtain desired materials and the lack of any statutory authority for the issuance of administrative warrants. Though never expressed, the Court's disregard of the statutory enforcement procedures was apparently based on a belief that the Congressionally mandated methods lack the necessary surprise effect; however, no empirical evidence of any sort was cited to support this conclusion. 560 F.2d at 219.

For the reasons set forth in Part 1 of this petition, it is submitted that the Sixth Circuit acted contrary to this Court's decision in *Tyler* in holding that an administrative warrant could be used in this case to search for and seize evidence of a suspected criminal violation.

retains "a general expectation of privacy. . . ." *Youghiogheny and Ohio Coal Company v. Morton,* 364 F. Supp. 45, 51 n. 5 (S.D. Ohio 1973). The Act gives a right of entry only into "coal mines". 30 U.S.C. § 813(b). (A. 6a).

10. 30 U.S.C. § 813(d) (A 7a-8a).

11. 30 U.S.C. § 818 (A. 10a-11a).

12. 30 U.S.C. § 819(a)(1) (A. 12a).

Petitioner also submits that the Sixth Circuit's interpretation of the *Camara* and *See* decisions as authorizing the use of administrative warrants for any form of entry and seizure under the Mine Safety Act is not only erroneous but in conflict with the Ninth Circuit's holding in *Midwest Growers Co-op. Corp. v. Kirkemo,* 533 F.2d 455 (9th Cir. 1976), which involved administrative inspections under the Interstate Commerce Act.

There, relevant portions of the Act authorized the Commission or its agents to "have *access* to and . . . to *inspect, examine,* and *copy* any and all accounts, books, records, [and] memorandums, . . ."[13] of the involved corporation during normal business hours. Despite this broad statutory grant of administrative authority, the Ninth Circuit refused to imply from the statute the authority to use administrative warrants to enforce inspection because the Act, while establishing procedures to compel access and copying, did not expressly provide for a right of entry upon the premises.

Although cognizant of this Court's prior decisions in *Camara, See* and *Colonnade Catering Corp. v. United States,*[14] the Ninth Circuit found nothing in those cases "to indicate that the [Supreme] Court was fashioning a general rule to allow all administrative agencies to utilize search warrants for their investigations." 533 F.2d at 462. The Court observed the absence of "express authority in the Interstate Commerce Act . . . for the Commission to use an 'administrative inspection search warrant' to enforce its statutory right of inspection", and

13. 49 U.S.C. § 320(g) (emphasis added).
14. 397 U.S. 72 (1970).

found nothing in its own decisions or in *Camara* and *See* to support the proposition that "the use of an inspection warrant could be . . . implied", adding that such a warrant represented a "radical departure from the injunctive procedure established by Congress . . ." *Id.* at 462. "In the absence of statutory authority to enter," said the Court, "the agency must utilize other investigatory techniques" provided by the statute. *Id.* at 462-63 (footnotes omitted).

By contrast, the Sixth Circuit has in this case *implied* from the Mine Safety Act, through application of the *Camara* and *See* decisions, the mine inspector's right to obtain an administrative warrant (1) to gain entry into petitioner's private offices, (2) to examine and review documents in those offices and (3) most significantly, to seize and carry away materials found there. Clearly, none of these investigatory powers is expressly granted in Section 813(a) and (b), or elsewhere in the Mine Safety Act. Unlike the Ninth Circuit, the Sixth Circuit interpreted statutory omissions "as evidence of congressional intent to endow mine safety inspectors with the broadest possible discretion,"[15] including the right to obtain administrative warrants and the forcible seizure of personal property.

Among the novel questions illustrated by this conflict, to which this Court has not yet addressed itself, and as to which guidelines are needed, the following are believed to be important:

1. May the right to use an *ex parte* administrative warrant to compel entry and seize documents be *implied,*

15. 560 F.2d at 218.

under the authority of *Camara* and *See,* from a statute which does not expressly grant the administrative agency the right to obtain such warrants or to enter the office premises or to examine and seize materials found there, but does expressly provide other procedures to compel entry and force production of desired records?

2. To what extent is the solution to question No. 1 dependent upon or affected by: (a) the type and relative effectiveness of the other investigatory procedures provided for by Congress in the statute, and (b) the fact that Congress has, in several regulatory statutes enacted since *Camara* and *See,* not including the Mine Safety Act, expressly authorized the obtainment of administrative search warrants?

In the Mine Safety Act, enacted two and one-half years after *Camara* and *See,* Congress clearly and carefully stipulated that entry as well as documents and records could be obtained from uncooperative mine operators by subpoena[16] and/or injunctive relief[17] and

16. 30 U.S.C. § 813(d), which authorizes the Secretary of the Interior to issue subpoenas for "the production of relevant papers, books and documents, . . ." in connection with the "investigation of any accident or *other occurrence* relating to health or safety in a coal mine, ..." (A. 7a). (Emphasis added.)

17. 30 U.S.C. § 818, which authorizes the Secretary of the Interior to obtain an injunction to compel an operator, to, *inter alia,* "admit [the inspector] to the mine" or "permit the inspection of the mine" or "furnish any information or report requested . . ." or "permit access to, and copying of, such records as the Secretary . . . determines necessary in carrying out the provisions of . . . [the Act]." (A. 10a).

also subjected such operators to penalties.[18] However, unlike the Comprehensive Drug Abuse Prevention and Control Act[19] and other post *Camara-See* legislation,[20] it did not provide for the issuance of administrative search warrants as a means of enforcing the agency's investigatory powers. It is difficult to imply the right to such warrants, since they represent, to use the Ninth Circuit's phrase, a "radical departure" from the subpoena and injunctive procedures established by Congress in the Mine Safety Act by permitting the warrant to issue *ex parte,* without prior notice to the operator whose offices are to be searched and property seized.

If certiorari is granted, petitioner will argue that Congress, by its failure in the Mine Safety Act to authorize expressly either a right of entry and seizure in private mine offices or the use of administrative warrants, while specifically providing for subpoenas, injunctions and fines, envisioned a prior demand for and refusal of entry or documents followed by federal court enforcement proceedings rather than employment of an *ex parte* warrant procedure.

18. 30 U.S.C. § 819(a)(1). (A. 12a).

19. 21 U.S.C. § 880. This legislation was enacted less than a year after the Mine Safety Act. It is interesting to observe that the legislative history of the Drug Abuse Prevention and Control Act shows that administrative search warrants were expressly provided for in response to this Court's decisions in *Camara* and *See.* H. R. REP. No. 91-1444, 91st Cong., [1970], U.S. CODE CONG. & AD. NEWS 4623.

20. *See, e.g.,* the Federal Environmental Pesticide Control Act of 1972, 7 U.S.C. §§ 135 et seq., 136g(b); the Endangered Species Act of 1973, 16 U.S.C. §§ 1531 et seq., 1540 (e)(2) and (3); and the Federal Noxious Weed Act of 1974, 7 U.S.C. §§ 2801 et seq., 2806.

Significantly, in *Marshall,* this Court strongly suggested agreement with the foregoing proposition by noting that, in comparison with the Occupational Safety and Health Act and other regulatory statutes, the Mine Safety Act "envision[ed] resort to federal court enforcement when entry is refused, employing specific language. . . ." 436 U.S. at ....., 98 S.Ct. at 1825. Also noteworthy is the fact that the cases in which this Court has sanctioned the use of administrative warrants (*Camara, See, Marshall* and *Tyler*) have all involved statutes which provided for entry and inspection but no specifically legislated means by which entry could be gained over the property owner's refusal. As the Ninth Circuit found in *Kirkemo,* and as this Court seemed to indicate in *Marshall,*[21] there is nothing in this Court's prior decisions revealing an intention to establish a general rule allowing all administrative agencies to employ administrative warrants in their investigations.

There is confusion as to the extent to which the right to administrative warrants may be implied from administrative statutes which expressly provide other means for the inspector to obtain entry and desired records and this Court should grant certiorari to resolve this important question.

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21. ". . . [W]e base today's opinion on the facts and law concerned with OSHA and do not retreat from a holding appropriate to that statute because of its real or imagined effect on other different administrative schemes." 436 U.S. at ....., 98 S.Ct. at 1825.

3. The Affidavits Used to Obtain the Search Warrants at Issue Failed to Supply the Requisite Probable Cause for the Issuance of the Warrants.

Petitioner incorporates by reference its argument on this point set forth in the petition for a writ of certiorari filed in this Court at No. 77-557.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendices

APPENDIX

FILED JULY 25, 1978
JOHN P. HEHMAN, Clerk

Nos. 76-2518, 76-2521 and 76-2522

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NO. 76-2518
UNITED STATES OF AMERICA,
Plaintiff-Appellant,
v.
CONSOLIDATION COAL COMPANY,
Defendant-Appellee.

NO. 76-2521
UNITED STATES OF AMERICA,
Plaintiff-Appellant,
v.
FRANCIS LEO MARKS,
Defendant-Appellee.

NO. 76-2522
UNITED STATES OF AMERICA,
Plaintiff-Appellant,
v.
RAYMOND ZITKO,
Defendant-Appellee.

Order

Before: CELEBREZZE and ENGEL, *Circuit Judges,* and CECIL, *Senior Circuit Judge.*

In *United States v. Consolidation Coal Co.*, 560 F.2d 214 (6th Cir. 1977), *vacated* and *remanded* ..... U. S. ..... (1978), this court reversed the district court's suppression of evidence seized from the offices of a coal mine operator. We reasoned that the district court erred in applying conventional criminal probable cause tests in examining the sufficiency of the search warrants involved. We upheld the warrants based upon "a lesser showing of probable cause comparable to that required to obtain a warrant to perform a periodic, administrative inspection of a commercial establishment." 560 F.2d at 218.

Three defendants petitioned the Supreme Court for writs of certiorari. In response thereto, the Supreme Court vacated our judgment and remanded the causes to this Court "for further consideration in light of *Marshall v. Barlow's, Inc.*, 436 U.S. ..... (1978) and *Michigan v. Tyler*, 436 U.S. ..... (1978)."

Inasmuch as the searches in question were conducted pursuant to search warrants and we have determined that the warrants met the same administrative search probable cause standard articulated in *Marshall*[1] and *Tyler*,[2] we see no reason to alter our original holding. Moreover, our holding that administrative search warrants were required under the facts of this case under the Federal Coal Mine Health and Safety Act of 1969 is fully consistent with the holding in *Marshall* that administrative search warrants are required under the Occupational Safety and Health Act of 1970.

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1. Continued
2. Continued

Therefore, it is hereby ordered that the prior judgment of this court be reinstated for the reasons set forth in our original opinion, 560 F.2d 214, and the judgment of the district court is reversed and the causes are remanded for further proceedings consistent with that opinion.

Judge Engel concurs, but for the more limited reasons expressed in his original concurrence. *See* 560 F.2d at 222.

ENTERED BY ORDER OF THE COURT

JOHN P. HEHMAN,
Clerk

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1. Continued
Marshall v. Barlow's, Inc., 436 U.S. ....., ... (1978), Slip Opinion at 12-13.

2. Continued
Michigan v. Tyler, 436 U.S. ....., ... n.5 & ..... (1978), Slip Opinion at 6 n. 5 & 8.

APPENDIX

FILED AUGUST 29, 1978
JOHN P. HEHMAN, Clerk

Nos. 76-2518, 76-2521 and 76-2522

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

CONSOLIDATION COAL COMPANY, a corporation; FRANCIS LEO MARKS, RAYMOND ZITKO,
Individuals,
Defendants-Appellees.

Order

Before: CELEBREZZE and ENGEL, *Circuit Judges,* and CECIL, *Senior Circuit Judge.*

Appellee, Consolidation Coal Company, filed a petition for rehearing with a request for rehearing en banc. No judge of this Court having moved for a rehearing en banc, the petition to rehear has been referred to the hearing panel.

Upon consideration, the Court being advised, it is ORDERED that the petition for rehearing be, and it is hereby denied.

ENTERED BY ORDER OF THE COURT
JOHN P. HEHMAN,
Clerk

APPENDIX

FILED SEPTEMBER 14, 1978
JOHN P. HEHMAN, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NO. 76-2518

United States of America,
Plaintiff-Appellant

v.

Consolidation Coal Company, et al.
Defendant-Appellee

Order Staying Mandate

ORDERED, That motion to stay mandate herein pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed for thirty days from this date; provided that, if within such thirty days, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition, record, and brief have been filed, the stay shall continue until the final disposition of the case by the Supreme Court. Unless this condition is complied with within such thirty days or any extension thereof made by the Court or any judge thereof, or if the condition is complied with, then upon the filing of copy of an order denying the writ applied for, the mandate shall issue.

ENTERED BY ORDER OF THE COURT
JOHN P. HEHMAN,
Clerk

APPENDIX

Section 103 (30 U.S.C. §813) of the Federal Coal Mine Health and Safety Act of 1969.

INSPECTIONS AND INVESTIGATIONS—PURPOSES

(a) Authorized representatives of the Secretary shall make frequent inspections and investigations in coal mines each year for the purpose of (1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents and the causes of diseases and physical impairments originating in such mines, (2) gathering information with respect to mandatory health or safety standards, (3) determining whether an imminent danger exists, and (4) determining whether or not there is compliance with the mandatory health or safety standards or with any notice, order, or decision issued under this subchapter. In carrying out the requirements of clauses (3) and (4) of this subsection, no advance notice of an inspection shall be provided to any person. In carrying out the requirements of clauses (3) and (4) of this subsection in each underground coal mine, such representatives shall make inspections of the entire mine at least four times a year.

Right of entry of investigators

(b) (1) For the purpose of making any inspection or investigation under this chapter, the Secretary or any authorized representative of the Secretary shall have a right of entry to, upon, or through any coal mine.

(2) For the purpose of developing improved mandatory health standards, the Secretary of Health, Education, and Welfare or his authorized representative shall have a right of entry to, upon, or through, any coal mine.

(3) The provisions of this chapter relating to investigations and records shall be available to the Secretary of Health, Education, and Welfare to enable him to carry out his functions and responsibilities under this chapter.

Utilization of facilities and personnel of other Federal agencies

(c) For the purpose of carrying out his responsibilities under this chapter, including the enforcement thereof, the Secretary may by agreement utilize with or without reimbursement the services, personnel, and facilities of any Federal agency.

Hearings; subpena; fees; contempt

(d) For the purpose of making any investigation of any accident or other occurrence relating to health or safety in a coal mine, the Secretary may, after notice, hold public hearings, and may sign and issue subpenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and administer oaths. Witnesses summoned shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of contumacy or refusal to obey a subpena served upon any person under this section, the district court of the United States for any district in which such person is found or resides or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the Secretary or to appear

and produce documents before the Secretary, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

Notice of accident; preservation of evidence; supervision of rescue operations

(e) In the event of any accident occurring in a coal mine, the operator shall notify the Secretary thereof and shall take appropriate measures to prevent the destruction of any evidence which would assist in investigating the cause or causes thereof. In the event of any accident occurring in a coal mine where rescue and recovery work is necessary, the Secretary or an authorized representative of the Secretary shall take whatever action he deems appropriate to protect the life of any person, and he may, if he deems it appropriate, supervise and direct the rescue and recovery activity in such mine.

Orders to insure protection of persons and property

(f) In the event of any accident occurring in a coal mine, an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to insure the safety of any person in the coal mine, and the operator of such mine shall obtain the approval of such representative, in consultation with appropriate State representatives, when feasible, of any plan to recover any person in the mine or to recover the mine or to return affected areas of the mine to normal.

Imminent danger notice; requisites; special inspection

(g) Whenever a representative of the miners has reasonable grounds to believe that a violation of a mandatory health or safety standard exists, or an imminent danger exists, such representative shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger. Any such notice shall be reduced to writing, signed by the representative of the miners, and a copy shall be provided the operator or his agent no later than at the time of inspection, except that, upon the request of the person giving such notice, his name and the names of individual miners referred to therein shall not appear in such copy. Upon receipt of such notification, a special inspection shall be made as soon as possible to determine if such violation or danger exists in accordance with the provisions of this subchapter.

Accompaniment right of representative of miners

(h) At the commencement of any inspection of a coal mine by an authorized representative of the Secretary, the authorized representative of the miners at the mine at the time of such inspection shall be given an opportunity to accompany the authorized representative of the Secretary on such inspection.

Hazardous conditions; spot inspections

(i) Whenever the Secretary finds that a mine liberates excessive quantities of methane or other explosive gases during its operations, or that a methane or other gas ignition or explosion has occurred in such mine which resulted in death or serious injury at any time during the previous five years, or that there exists in such mine other especially hazardous conditions, he shall provide a minimum of one spot inspection by his authorized representative of all or part of such mine during every five working days at irregular intervals. Pub.L. 91—173, Title I, § 103, Dec. 30, 1969, 83 Stat. 749.

Section 108 (30 U.S.C. §818) of the Federal Coal Mine Health and Safety Act of 1969.

CIVIL ACTION FOR RELIEF; JURISDICTION AND VENUE; GROUNDS FOR INVOCATION OF REMEDIES; FORCE AND EFFECT OF ORDERS; REPRESENTATION OF SECRETARY

The Secretary may institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order in the district court of the United States for the district in which a coal mine is located or in which the operator of such mine has his principal office, whenever such operator or his agent (a) violates or fails or refuses to comply with any order or decision issued under this chapter, or (b) interferes with, hinders, or delays the Secretary or his authorized representative, or the Secretary of Health, Education, and Welfare or his authorized representative, in carrying out the provisions of this chapter, or (c) refuses to admit such representatives to the mine, or (d) refuses to permit the inspection of the mine, or the investigation of an accident or occupational disease occurring in, or connected with, such mine, or (e) refuses to furnish any information or report requested by the Secretary or the Secretary of Health, Education, and Welfare in furtherance of the provisions of this chapter, or (f) refuses to permit access to, and copying of, such records as the Secretary or the Secretary of Health, Education, and Welfare determines necessary in carrying out the provisions of this chapter. Each court shall have jurisdiction to provide such relief as may be appropriate. Temporary restraining orders shall be issued in accordance with Rule 65 of the Federal Rules of Civil Procedure, as amended, except that the time limit in such orders, when issued without notice,

shall be seven days from the date of entry. Except as otherwise provided herein, any relief granted by the court to enforce an order under clause (a) of this section shall continue in effect until the completion or final termination of all proceedings for review of such order under this subchapter, unless, prior thereto, the district court granting such relief sets it aside or modifies it. In actions under this section, subject to the direction and control of the Attorney General, as provided in section 507(b) of Title 28, attorneys appointed by the Secretary may appear for and represent him. In any action instituted under this section to enforce an order or decision issued by the Secretary after a public hearing in accordance with section 554 of Title 5, the findings of the Secretary, if supported by substantial evidence on the record considered as a whole, shall be conclusive. Pub.L. 91—173, Title I, § 108, Dec. 30, 1969, 83 Stat. 756.

Section 109 (30 U.S.C. §819) of the Federal Coal Mine Health and Safety Act of 1969.

PENALTIES—CIVIL PENALTIES FOR VIOLATIONS OF MANDATORY HEALTH AND SAFETY STANDARDS; HEARINGS; FACTORS DETERMINING ASSESSMENT; FINDINGS; APPLICABILITY OF SECTION 554 OF TITLE 5; PROCEDURES FOR ENFORCEMENT

(a) (1) The operator of a coal mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this chapter, except the provisions of subchapter IV of this chapter, shall be assessed a civil penalty by the Secretary under paragraph (3) of this subsection which penalty shall not be more than $10,000 for each such violation. Each occurrence of a violation of a mandatory health and safety standard may constitute a separate offense. In determining the amount of the penalty, the Secretary shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation.

(2) Any minor who willfully violates the mandatory safety standards relating to smoking or the carrying of smoking materials, matches, or lighters shall be subject to a civil penalty assessed by the Secretary under paragraph (3) of this subsection, which penalty shall not be more than $250 for each occurrence of such violation.

(3) A civil penalty shall be assessed by the Secretary only after the person charged with a violation under this chapter has been given an opportunity for a public hearing and the Secretary has determined, by decision incorporating his findings of fact therein, that a violation did occur, and the amount of the penalty which is warranted, and incorporating, when appropriate, an order therein requiring that the penalty be paid. Where appropriate, the Secretary shall consolidate such hearings with other proceedings under section 815 of this title. Any hearing under this section shall be of record and shall be subject to section 554 of Title 5.

(4) If the person against whom a civil penalty is assessed fails to pay the penalty within the time prescribed in such order, the Secretary shall file a petition for enforcement of such order in any appropriate district court of the United States. The petition shall designate the person against whom the order is sought to be enforced as the respondent. A copy of the petition shall forthwith be sent by registered or certified mail to the respondent and to the representative of the miners in the affected mine or the operator, as the case may be, and thereupon the Secretary shall certify and file in such court the record upon which such order sought to be enforced was issued. The court shall have jurisdiction to enter a judgment enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order and decision of the Secretary or it may remand the proceedings to the Secretary for such further action as it may direct. The court shall consider and determine de novo all relevant issues, except issues of fact which were or could have been liti-

gated in review proceedings before a court of appeals under section 816 of this title, and upon the request of the respondent, such issues of fact which are in dispute shall be submitted to a jury. On the basis of the jury's findings, the court shall determine the amount of the penalty to be imposed. Subject to the direction and control of the Attorney General, as provided in section 507(b) of Title 28, attorneys appointed by the Secretary may appear for and represent him in any action to enforce an order assessing civil penalties under this paragraph.

Willful violations or refusal to comply with health and safety standards by operators of mines

(b) Any operator who willfully violates a mandatory health or safety standard, or knowingly violates or fails or refuses to comply with any order issued under section 814 of this title, or any order incorporated in a final decision issued under this subchapter, except an order incorporated in a decision under subsection (a) of this section or section 820(b) (2) of this title, shall, upon conviction, be punished by a fine of not more than $25,000, or by imprisonment for not more than one year, or by both, except that if the conviction is for a violation committed after the first conviction of such operator under this chapter, punishment shall be by a fine of not more than $50,000, or by imprisonment for not more than five years, or by both.

Willful violations or refusal to comply with health and safety standards by corporate operators of mines

(c) Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under

this chapter or any order incorporated in a final decision issued under this chapter, except an order incorporated in a decision issued under subsection (a) of this section or section 820(b)(2) of this title, any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (b) of this section.

False statements or representations

(d) Whoever knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained pursuant to this chapter or any order or decision issued under this chapter shall, upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than six months, or by both.

Distribution or sale of noncomplying components

(e) Whoever knowingly distributes, sells, offers for sale, introduces, or delivers in commerce any equipment for use in a coal mine, including, but not limited to, components and accessories of such equipment, which is represented as complying with the provisions of this chapter, or with any specification or regulation of the Secretary applicable to such equipment, and which does not so comply, shall, upon conviction, be subject to the same fine and imprisonment that may be imposed upon a person under subsection (d) of this section.

Pub.L. 91—173, Title I, § 109, Dec. 30, 1969, 83 Stat. 756.